No. 12,465

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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HERBERT WINDSOR, BAEDA E. WINDSOR (husband and wife),
*Appellants,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

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## BRIEF FOR APPELLEE.

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### THE FACTS.

The evidence before the Court establishes the following facts:*

1. Many years prior to the happening of the accident which is the basis of plaintiffs' complaint, the United States entered into an agreement with Yosemite Park & Curry Company whereby the United States leased certain portions of the Yosemite Park to said Company for the establishment and operation by

*R.T. denotes Reporter's Transcript. First figure is the page number and second figure the line number.

said Company of hotel and camping facilities. (Exhibit 8—"Lease").

2. At the time of the accident mentioned in the complaint, as shown by the blue print drawings (Exhibit No. 1), the Yosemite Park & Curry Company was maintaining the Lodge, including the wooden platform in front thereof, and the concrete step or bulkhead below said platform and adjacent to the paved automobile parking area. The United States was maintaining the paved parking area up to a line coincidental with the exterior perpendicular face of said concrete bulkhead.

3. Said platform and concrete bulkhead extended the entire length of the Lodge building. Above said platform (reached by three steps) was a porch enclosed by a wooden railing.

4. On the date of the accident the appellants arrived at Yosemite Park and left their automobile parked against the platform. They stepped up onto the bulkhead near their car, then to the wooden platform; proceeding along the platform they mounted the steps to the porch and entered the cafeteria, where they dined.

5. Upon leaving the cafeteria in the Lodge building at approximately 8:00 P.M. on the longest day of the year (R.T. 68), the appellant Baeda Windsor proceeded down the steps from the porch and diagonally across the wooden platform in the direction of the spot where the family automobile was parked.

6. According to her testimony, as she reached the edge of the platform, something made her lose her balance. She stated that in an effort to regain her balance she stepped onto the concrete bulkhead and thence down to the pavement. Her foot struck the pavement partly in and partly out of a shallow depression extending along the bulkhead adjacent to the perpendicular exterior face thereof. She felt something "crack" in her foot and immediately stepped down with the other foot, with the result that it was similarly injured. (R.T. 34-13). She did not know what caused her to fall (R.T. 46-22). They were retracing their steps when the accident happened. (R.T. 67-23).

7. At the time of the accident, the porch and platform were dimly lighted, although across the parking area—some fifty feet away—there were lights on standards and a large bonfire was burning. (R.T. 79-15).

8. According to an impartial witness, Joseph I. McMullen, the accident happened in a different fashion. He testified that Mrs. Windsor was standing near the edge of the platform speaking to two gentlemen and then stepped over the edge and fell to the ground. (R.T. 78-5).

9. On the date of the accident there were white lines painted on the pavement of the parking area immediately opposite the stairs leading from the platform to the porch. In entering the Lodge the appellants did not ascend the bulkhead and platform at this point, nor did the accident occur there.

## ARGUMENT.

### (1) UNDER THE FEDERAL TORT CLAIMS ACT THE UNITED STATES HAS WAIVED A PORTION OF ITS SOVEREIGN IMMUNITY TO SUIT.

But the United States does not consent to be sued in all situations where, if a private person, it would be liable in tort. The act specifically narrows the field to cases in which liability arises under the doctrine of *"respondeat superior"*. The act states that the government may be sued upon claims in tort arising

> "* * * on account of damage to or loss of property or on account of personal injury or death *caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment"*. (Emphasis added).

See

*Hubsch v. U. S.*, 174 Fed. (2d) 7;

*Rutherford v. U. S.*, 73 F. Supp. 867 (affirmed in 168 F. (2d) 70);

*Fries v. U. S.*, 170 F. (2d) 176 (certiorari denied, 226 U.S. 954).

This liability is further limited by the exclusions enumerated in the act, including the following:

> "(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused."

There is no evidence before the Court to indicate that the maintenance of the depression or gutter referred to in the evidence was other than a discretionary function of the Department of the Interior or National Park Service. Therefore the maintenance or failure to maintain said gutter or depression in the pavement comes within the aforementioned exclusion of the Act.

See

*Denny v. U. S.,* 171 F. (2d) 365 (as to discretionary matters).

There is no evidence of any negligent or wrongful act or omission on the part of any employee of the United States *while acting within the scope of his office or employment,* or otherwise.

(2) The proximate cause of the accident was either the appellant's own carelessness in stepping over the edge of the platform, or it was a condition of premises not within the control of the United States. Conceding for the sake of argument, that plaintiff's version of the accident is correct, she was caused to fall by reason of the rough condition of the edge of a platform exclusively under the control of, and maintained by the Yosemite Park & Curry Company. If there was any negligence causing appellant's injury, it was the negligence of the Yosemite Park & Curry Company.

Whatever the condition of the roadway or gutter below the bulkhead, it was not the proximate cause of appellant's injury. She fell because of a roughness in

the platform. Whatever caused her to fall was the proximate cause of any injury she received.

(3) The condition complained of by appellants was an open and obvious condition, and one which was known to them, or should have been known, had appellant Baeda Windsor used ordinary care and caution on the occasion of the accident.

(4) The accident which occurred to appellant, Baeda Windsor, was not such as could be foreseen or expected by a person of ordinary intelligence.

(5) It should be noted that a marked means of ingress and egress was provided for patrons of the Lodge, and that the appellants elected not to use it but instead to climb onto the platform at another point—a place set aside for automobile parking. Similarly, at the moment of the accident, the appellant, Baeda Windsor, was in the act of taking a short cut, having chosen an unsafe way, when a safe way was provided for her. In doing so, she assumed any attendant risk of injury.

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**PLAINTIFFS' BRIEF.**

We cannot agree with appellants' interpretation of the facts, or with their statements regarding the applicable law.

As to point I of appellants' brief, the entire testimony is, of course, not included in appellants' brief. Taking the entire testimony, at its best for appellants, it is merely a conflict in testimony and, as this Court

has decided, where evidence, even though conflicting, supports the findings and judgment of the trial Court, the Appellate Court will not order a reversal. It also appears that the Appellate tribunal must take that view of the evidence most favorable to the appellee.

*Bellon v. Silver Gate Theatres, Inc.,* 4 Cal. (2d) 1;

*Cleo Syrup Co. v. Coca-Cola Co.,* 139 Fed. (2d) 416.

The appellants were there not "at the instance of both the lessor and lessee" but voluntarily. The Government did not invite them to use the premises leased to and by the Yosemite Park & Curry Co., to-wit, the Lodge.

As to points II and III:

(a) Whether the Government had control of the Lodge Cafeteria would be reflected by the lease and it shows control and complete maintenance of the structure was the duty of the lessee. As lessor, the United States is not liable to appellants.

(b) It is likewise, if anything, a conflict in evidence.

(c) Appellants insist that the accident happened upon a "stairway" and argue that the Building Code sections read in evidence, having been violated by the Yosemite Park & Curry Company in not providing equal risers, nor providing handrails, etc., the United States is somehow guilty of negligence.

It is obvious from the evidence before the Court that the accident did not happen upon a "stairway".

No ordinary interpretation of that term could make it applicable to the structure involved here. The evidence discloses that the wooden platform below the railed porch of the building was in the nature of a sidewalk, raised above the level of the roadway, as is common in areas where there is a winter snowfall. Adjacent to and lower than this platform was a concrete bulkhead running the length of the area designed for the parking of automobiles. The mere coincidence of a pavement, bulkhead and platform adjacent to and parallel with one another does not constitute them a "stairway". The fact that above the platform, *and separated therefrom by a railing,* there was a porch with three flights of steps leading down to the platform, argues against the structure complained of being a "stairway". The Building Code requirements for stairways have therefore no application to the platform and bulkhead.

(d) Appellants cite certain cases in support of general principles of law with relation to negligence. These authorities, however, have no application to the facts in the instant case.

There was only one proximate cause of the injury to appellant, Baeda Windsor. There is no evidence that any employee of the United States did anything or omitted to do anything, as a result of which she fell.

The most the United States can be accused of under the evidence is the maintenance of a shallow gutter into which the plaintiff was caused to fall by reason of the negligence of a third party. To assert that such

action constituted negligence is on a par with asserting that a property owner would be negligent for maintaining a concrete sidewalk in front of his house if a passing pedestrian tripped up another, who thus suffered a fractured skull which he would not have suffered if the sidewalk had been earth instead of concrete.

The existence of the shallow gutter at the place where plaintiff fell is a mere "condition". It was in no way connected with her fall. Whether said "condition" was the result of negligence is wholly immaterial unless it was a proximate cause of the accident.

As to point IV:

In view of the testimony, among other things, that the appellant, Baeda Windsor, was standing at the edge of the platform with two gentlemen about three or four feet from her who were talking to her, and she suddenly fell while standing still (R.T. 78), there is, in our opinion, sufficient evidence to justify a finding of contributory negligence.

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## CONCLUSION.

In order to determine the issue of liability in this case, it is necessary to determine:

(1) Has the Court jurisdiction to make any finding?

(2) What was the proximate cause of the injury?

(3) Was it caused by an employee of the defendant acting within the scope of his employment?

(4) Was there contributory negligence?

We submit that it is not necessary for the Court to inquire into whether or not the maintenance of the gutter complained of in this case constituted negligence unless the Court first finds that the plaintiff was injured by reason of the act or omission of some employee of the appellee *acting within the scope of his employment.*

The evidence shows that appellant, Baeda Windsor, was caused to fall by either her own carelessness or by reason of some condition of the wooden platform or sidewalk, which was *exclusively maintained by the Yosemite Park & Curry Company.* Since the maintenance of the platform or sidewalk was the duty of that Company exclusively, it is impossible to reach the conclusion that any act or omission in such maintenance could have been the act or omission of an employee of the United States *acting within the scope of his employment.* There is no evidence that any employee of the United States undertook to, or did maintain or do any act in connection with the platform. Even if such was the case, it is obvious that such act was not within the scope of his employment, since the United States had no duty in connection with the maintenance of the platform.

The evidence shows that the accident was caused *solely* by some condition of the platform or by appel-

lant's own carelessness in stepping off the platform, and the trial Court found that it was due to her own carelessness.

Appellants argue that Baeda Windsor would not have received the precise injury she did receive if the gutter had not been there. This may or may not be true, but that does not make the presence of the gutter the proximate cause of the injury.

We submit that in any event the presence of a shallow depression or gutter at the place complained of does not suggest or establish any negligence. It is necessary to consider all the circumstances, including the fact that the condition complained of existed not in any urban or rural community but in a recreation area, a National Park set aside for the maintenance of its natural beauties for the benefit of the public. An ordinary person of average intelligence does not expect roads, paths, or other accommodations there to be developed to the degree to which he is accustomed in more artificial communities.

Dated, San Francisco, California,
June 16, 1950.

Respectfully submitted,

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